



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 216 and 235**

**[Docket DARS-2022-0023]**

**RIN 0750-AL58**

**Defense Federal Acquisition Regulation Supplement: Repeal of Preference for Fixed-Price Contracts (DFARS Case 2022-D007)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly R. Ziegler, telephone 703-901-3176.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is issuing a final rule amending the DFARS to implement section 817 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81), which repeals section 829 of the NDAA for FY 2017 (Pub. L. 114-328). This rule

removes text that was added to the DFARS associated with the implementation of section 829.

DoD published a final rule in the **Federal Register** at 84 FR 65304 on November 27, 2019, to implement section 829. Section 829 required contracting officers to first consider fixed-price contracts, including fixed-price incentive contracts, when determining contract type and to obtain approval from the head of the contracting activity for certain cost-reimbursement contracts.

This final rule removes references, policies, and limitations related to section 829 at DFARS sections 216.102(1), 216.301-3(2), 216.401(d), and 235.006(b)(i). Conforming changes are made to revise two cross-references at 235.006(b)(ii). At DFARS 216.102(3) an obsolete reference to DFARS 225.7301-1 is removed, since the requirement at 225.7301-1 was repealed by section 888 of the NDAA for FY 2021 (Pub. L. 116-283); see the final rule for DFARS Case 2021-D019 published in the **Federal Register** at 86 FR 48339 on August 30, 2021.

## **II. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of

appropriated funds and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because this rule is updating internal DoD operating procedures.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items**

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts at or below the simplified acquisition threshold, for commercial services, or for commercial products including COTS items.

### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

#### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

#### **VI. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

#### **VII. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 216 and 235**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 216 and 235 are amended as follows:

1. The authority citation for 48 CFR parts 216 and 235 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 216—TYPES OF CONTRACTS**

2. Revise section 216.102 to read as follows:

**216.102 Policies.**

In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use of any cost-reimbursement line item for the acquisition of production of major defense acquisition programs is prohibited, unless the exception at 234.004(2)(ii) applies.

3. Revise section 216.301-3 to read as follows:

**216.301-3 Limitations.**

For contracts in connection with a military construction project or a military family housing project, contracting officers shall not use cost-plus-fixed-fee, cost-plus-award-fee, or cost-plus-incentive-fee contract types (10 U.S.C. 2306(c)). This applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the Armed Forces.

4. Amend section 216.401 by revising paragraph (d) to read as follows:

## **216.401 General.**

\* \* \* \* \*

(d) The determination and findings justifying that the use of an incentive- or award-fee contract is in the best interest of the Government, may be signed by the head of contracting activity or a designee—

(i) No lower than one level below the head of the contracting activity for award-fee contracts; or

(ii) One level above the contracting officer for incentive-fee contracts.

\* \* \* \* \*

## **PART 235—RESEARCH AND DEVELOPMENT CONTRACTING**

### **235.006 [Amended]**

5. Amend section 235.006 by—

a. Removing paragraph (b) (i);

b. Redesignating paragraphs (b) (ii) and (iii) as paragraphs (b) (i) and (ii), respectively;

c. In the newly redesignated paragraph (b) (ii) (A) (3), removing “(b) (iii) (A) (1) and (2)” and adding “(b) (ii) (A) (1) and (2)” in its place; and

d. In the newly redesignated paragraph (b) (ii) (A) (3) (ii), removing “(b) (iii) (A) (3) (i)” and adding “(b) (ii) (A) (3) (i)” in its place.